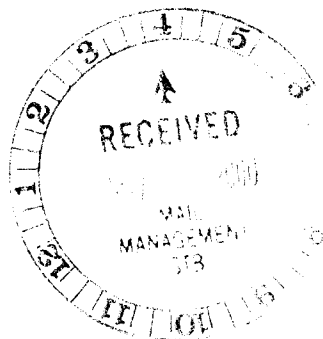


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ODOT-4

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (Sub-No. 1)



MAJOR RAIL CONSOLIDATION PROCEDURES

VERIFIED COMMENTS OF  
OKLAHOMA DEPARTMENT OF TRANSPORTATION

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Dated: November 17, 2000

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BEFORE THE  
**SURFACE TRANSPORTATION BOARD**  
 STB EX PARTE NO. 582 (Sub-No. 1)

**MAJOR RAIL CONSOLIDATION PROCEDURES**

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**VERIFIED COMMENTS OF  
 OKLAHOMA DEPARTMENT OF TRANSPORTATION**

The Board issued proposed revisions to its Major Rail Consolidation Procedures in a notice of proposed rulemaking (“NPR”) served October 3, 2000. The Oklahoma Department of Transportation (“ODOT”) files these comments in accordance with the procedures set forth in the NPR.

**Introduction**

On March 31, 2000, the Board issued an advanced notice of proposed rulemaking (“ANPR”), seeking input from public agencies, railroads - both large and small, shippers and other interested parties. Over 100 parties, including ODOT filed comments,<sup>1</sup> demonstrating the strong interest and broad range of concerns in how the Board’s current regulations operate. After review of the views expressed, the Board has now issued its proposed revisions.

ODOT generally supports the “paradigm shift” away from the pro-merger policy of the present, to a proposed policy that would require future merger applicants to bear a heavier burden of showing that the merger is in the public interest. NPR at 10. In particular, ODOT supports the requirements that applicants demonstrate how the proposed consolidation will

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<sup>1</sup> ODOT filed both Comments (ODOT-2) and a Reply (ODOT-3).

“enhance competition” and not only preserve it, and how it will provide “improved service.”

Proposed §1180.1(a). ODOT also fully supports the new requirements for assurances that the promised service will be realized. Proposed §1180.1(h).

However, ODOT is concerned with the Board’s reliance on applicants to propose solutions without specific guidance. In the past it may have made sense to examine applications on a case-by-case basis and to allow “case law” to guide future applicants (and protestants) as to what will satisfy the Board. But, it is clear that there are few major consolidations remaining, and these will likely follow closely one behind the other.<sup>2</sup> Accordingly, as suggested by Vice Chairman Burkes (NPR at 40), ODOT believes that, to be effective, the proposed regulations must provide more specific guidance to both applicants and to parties affected by the proposed merger.

### **Background**

The interest and role of ODOT is described in detail in ODOT-2. However, a brief summary may be beneficial for the Board in reviewing these Comments.

ODOT has responsibility for all of Oklahoma’s transportation systems, including its railroads. As such, it is involved in the oversight of all phases of the planning and operations of railroads operating in the State, both freight and passenger.

Over the last twenty years, Oklahoma has seen a substantial reduction of Class I service as Class I carriers went bankrupt, voluntarily withdrew and joined together through merger. The number of Class I carriers serving the state has dwindled from six in 1979 to three

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<sup>2</sup> This is recognized by the Board in its decision to look at the down stream effects of future mergers. NPR at 20-21.

(BNSF, UP and KCS) today. However, 19 Class III short lines have been organized to serve the rural, largely agricultural shippers that dot Oklahoma's countryside. Many of the shippers on these short lines tend to be smaller country elevators with limited facilities, but which serve an important gathering function for local farmers.<sup>3</sup> Much of ODOT's investment has been directed at preserving this service to smaller rural shippers. However, as a result of mergers and the growth in size of Class I carriers, ODOT has seen various changes that threaten these smaller shippers and the short lines that depend on their business.

Through a series of transactions over the years, ODOT now owns lines of railroad totaling approximately 850 miles which are operated by various carriers. An additional 2,850 miles of rail lines in Oklahoma are currently owned by the private carriers operating in the State.

In 1999 Oklahoma finally saw the commencement of mass transportation of passengers by rail (Amtrak) between Oklahoma City and Fort Worth, Texas over lines of BNSF. Oklahoma is currently working to extend intercity passenger service over lines owned and operated by another Class I freight carrier, and in another instance, plans are for the passenger carrier to operate over lines owned by ODOT and operated by a Class III carrier.

### **Comments**

As discussed in the Board's summary (NPR at 221-224), ODOT has several areas of concern based on its experience with past mergers. These comments will describe each area and how the Board's proposed rules address (or fail to address) ODOT's concerns.

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<sup>3</sup> Elimination of the country elevator would cause the harvest to be trucked further distances to larger collection facilities, adding time and transportation costs, and burdening Oklahoma's secondary roads.

**1. Measurement of merger benefits.** Although the emphasis of the Board's policy has changed, the policy still looks at measuring public benefits including "economic efficiency." Proposed §1180.1, NPR at 11. However, in calculating potential benefits, applicants should not be permitted to include economic efficiencies unless they can show that they were operating efficiently before the merger.

For example, as discussed in ODOT-2, one of the benefits applicants often claim is that they will be better able to utilize their equipment. However, as carriers get bigger they do not necessarily use their equipment more efficiently. For example, BNSF has grown over the years through various mergers, yet it reported in its comments in response to the ANPR that it has 500 excess locomotives and 25,000 cars in storage. On the other hand, Oklahoma grain shippers often face car shortages during harvest season.<sup>4</sup> ODOT questions why carriers need to grow larger to make more efficient use of their equipment, when it seems they could find more efficient ways to use their equipment now.

This suggested requirement is a corollary to the Board's proposed requirements that claimed public benefits result from "greater" economic efficiency (and presumably not from efficiencies currently available), and that applicants demonstrate that the benefits claimed could not be realized by other means.

**2. Enhanced competition.** Although the Board's proposed regulations would require applicants to provide for enhanced competition, they do not specify how or where parties can request it. The where and how are left for applicants to propose. In past mergers this has

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<sup>4</sup> The car shortages can be found on the BNSF and Union Pacific, both being entities that are the product of recent mergers.

meant Class I carriers dealing with other Class I carriers -- CSX and NS agreed on how to carve up Conrail, UP granted substantial trackage rights to BNSF to get approval to acquire SP, and BN granted trackage rights to SP to get its merger with ATSF approved. As a further example, CSX and NS created shared asset areas in Detroit and northern New Jersey, and with the Board's approval, used the creation of enhanced competition in those areas to defeat requests for similar enhanced competition in other regions such as the Buffalo area. In the past, the Board's goal has never been to equalize competitive opportunities among regions, shippers, or railroads.

Because of the large number of short lines operating in the State, ODOT is especially concerned that the new regulations ensure that short lines and the rural shippers they serve get their fair share of the enhanced competition that is created as a result of any future merger. Rather than improved service or enhanced competition, short lines and their customers in Oklahoma have seen reduced frequency of service as merged carriers focus on their ever longer single-line hauls, pricing that benefits larger on-line shippers, and continued enforcement of restrictions that prevent short line customers from obtaining competitive prices or providing additional services (such as co-loading) that would make better pricing available. Oklahoma has made a substantial investment in various rail lines throughout the State with the specific intent of preserving and expanding access to all areas of the State, including the largely rural agricultural areas served by its 19 short lines. ODOT believes that the regulations should require some minimal conditions such as those suggested in response to the ANPR by the ASLRRA "Bill of Rights" and others (*see* ODOT-3) to ensure that some level of enhanced competition will be supplied to the short line fringes that will otherwise be ignored.

Specifically, ODOT believes the following issues need to be addressed:

**(a) Competitive pricing.** The pricing issues raised by ODOT previously have not been addressed in the Board's proposed regulations. As noted in ODOT-2, as the Class Is have merged and grown bigger, they seem to care less about the smaller shippers located in rural areas off their main lines. Where there is rail competition, ODOT sees lower prices being offered to shippers. On the other hand, where shippers are captive (particularly when the shipper is located on a captive short line), higher prices that do not reflect increased operating costs for the Class Is are the norm.

Additionally, as Class I carriers have continued to merge and grown larger and larger, their pricing has changed to emphasize their longest hauls and to encourage shippers to invest in larger facilities that can handle 100 car unit grain trains. They have talked about eliminating the 26 car units that had been common in Oklahoma. Few, if any, country elevators have facilities that can handle even 26 car units at one time, and because of their relatively low volumes and space constraints, enlargement of facilities is usually not practicable. Further, even if facilities could be expanded, most short-line track infrastructure would not be able to handle 100 car trains. ODOT has already invested to preserve infrastructure, but cannot afford to upgrade lines or loading facilities to handle the new longer trains.<sup>5</sup>

Short lines have attempted to deal with these issues by providing multiple switches and co-loading between elevators to put together the size units (either 26 or 54 or 100 cars) that the Class Is require, while at the same time making the better pricing available to their

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<sup>5</sup> These infrastructure problems will only be exacerbated by the introduction of new heavier cars.

customers. Since the Class I connection is still receiving a unit train at the interchange bound for a single destination, there is no increased handling cost to the Class I. Yet Class Is (which often have retained pricing authority over their short-line spinoffs) limit the ability of short lines to co-load from different stations or to perform multiple switches. These pricing decisions may benefit the Class Is, but they hurt the shippers on the branch lines located throughout the State including those that ODOT has purchased.<sup>6</sup> Smaller shippers should not be priced out of the market just because they are small. They should be given the opportunity to compete by receiving fair, competitive pricing, and the proposed regulations should require merging carriers to provide such pricing to connecting short lines and their customers.

**(b) Elimination of barriers.** The elimination or limitation of the “paper barriers” that often restrict the ability of short lines to provide competitive service would serve to enhance competition to rural shippers. These paper barriers were originally designed to make the sale more attractive to the short line buyer, while preserving the bulk of revenue for the Class I, and eliminating what was often costly branch line service. The deals were premised on the economics, pricing and service that existed at the time of the sale. However, all of these factors have changed. While Class Is have merged and grown larger, the short lines are limited to the lines they bought. While Class Is have focused on longer hauls and larger trains to become more profitable, short lines can only rely on traffic growth. Many short lines have been around for 5 to 10 years, and the Class I sellers have certainly received substantial value as a result of the barriers they imposed. In any new merger, the applicants should be required to rescind all paper barriers.

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<sup>6</sup> Additionally, to the extent these policies cause ODOT’s branch line operators to lose revenue, ODOT loses rental revenue as well.



This will result in additional competitive options for shippers located on short lines and should stimulate both a growth in traffic and improved pricing.

Further, ODOT would support opening terminals by requiring merger applicants to provide switching at an agreed-upon *reasonable* fee, to all exclusively served shippers and short lines located within or adjacent to terminal areas.<sup>7</sup> Of course, if such a condition were imposed for the benefit of short lines, it would have to be further conditioned on the elimination of contractual barriers that would frustrate use of the switching fee to connect with shippers or other carriers.<sup>8</sup>

**3. Harm to short lines.** Almost by definition, short lines cannot afford to lose any traffic as the result of a merger. Current regulations require that for protective conditions to be imposed, a short line must demonstrate that the it provides an “essential service” and that the service will be lost, *i.e.* that the short line will go out of business. 49 C.F.R. §1180.1(c)(2)(ii). These standards are so high that relief is almost never granted.

The Board seems to have recognized that there is a problem with the existing regulations and has proposed amendments to the provisions that appear at proposed 49 C.F.R. §1180.1(c)(2)(ii). However, ODOT is not clear how the changes have affected what a short line would need to demonstrate in order to be entitled to relief.

The definition of “essential service” has not changed – it still looks at the public

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<sup>7</sup> In the recent CSX/NS/Conrail proceeding, the Board expanded the NIT League switching conditions to cover short lines as well as shippers. Since short lines often act as gathering agents, ODOT believes it is often reasonable to treat short lines and shippers similarly.

<sup>8</sup> This is similar to the suspension provided for in the “Railroad Industry Agreement” entered into voluntarily by the Class Is and a number of short lines, and filed with the Board in Ex Parte 575.

need for the service and to the transportation alternatives available. However, the Board has increasingly recognized the “vital role” that short lines play in preserving service, in particular to rural agricultural areas. There are almost never rail alternatives in the areas that short lines serve. Without these short lines the nation’s rail system will turn into a shrinking network of trunk lines with the fringes left without direct rail service. Thus, the regulations should provide that short lines provide “essential services.”

The Board indicates that its proposed regulations give “increased emphasis to the role of smaller carriers and ports as vital links in the transportation system.” NPR at 15. The new regulations indicate that the Board will “consider” whether shifts in traffic patterns undermine the ability of short lines to “sustain” essential services. However, the new regulations do not clearly change the threshold of what these vital links need to demonstrate to be entitled to relief -- it is not clear whether a short line must demonstrate that it will be forced out of business before it can be entitled to relief.

ODOT believes that, almost by definition, any loss of traffic by a short line will undermine (in the long run, if not immediately) its ability to maintain its lines, to upgrade its infrastructure to handle the next generation of cars and to provide reliable competitive service. Thus, ODOT requests that the Board clarify the proposed regulations to make it clear that short lines provide “essential services” in preserving rail service to the fringes of the rail network. Further, the regulations should specify that any significant loss of traffic resulting from traffic shifts caused by the merger will undermine the ability of the short line to continue to preserve

service and entitle the short line to relief.<sup>9</sup>

**4. Service related losses.** The requirement of service assurance plans (proposed §§1180.1(h), 1180.10), including contingency plans, is a step in the right direction. Hopefully, such plans will foster the goal of minimizing post-merger service disruptions. Yet disruptions almost certainly will occur. As is evident from the recent CSX/NS/Conrail transaction, no amount of planning can anticipate all problems. Haunted by the service melt-down that followed the UP/SP merger, CSX and NS took almost a year to finalize their implementing plan, and “choke points” still occurred on both carriers causing shipment delays, rerouting of traffic and often transloading of stalled traffic onto trucks. These delays have resulted in higher costs to shippers and loss of traffic for short lines when traffic was trucked around them because of choke points on the connecting Class I carriers. The Board’s requirement that a “problem resolution team” be established to deal with service problems and “related claims” is not sufficient. In such circumstances, the Board’s regulations should provide a requirement that applicants provide not only a team to address the problems, but should require prompt reimbursement to both shippers and short lines for demonstrable service-related losses. In this regard it is imperative that the Board clearly establish that short lines are entitled to reimbursement for lost traffic that results from post-merger service related failures.

**5. Passenger service.** As ODOT noted previously in this proceeding, passenger service, including the newly instituted AMTRAK service in Oklahoma, has much more stringent on-time requirements than most freight, especially if passenger traffic is to grow. ODOT’s

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<sup>9</sup> The Board could create a presumption that, for example, a 10% loss of traffic, would entitle a short line to relief. Parties would then have the opportunity in particular instances to demonstrate that a different level is appropriate.

concerns relating to passenger traffic are met in large measure by the proposed regulations. The regulations recognize passenger service as a “essential service.” 1180.1(c)(2)(ii), NPR at 15. However, the regulations should make clear that any substantial interference with passenger service will undermine such service and will be grounds for protective conditions (without the necessity of a showing that the service will be run out of business). Harm to passenger service should be eligible for protective conditions in such instances because the harm caused is not competitive harm, but rather by definition is harm to the public that is provided by mass transit. *See* proposed §1180.1(d).

Under proposed regulation 1180.10, applicants will specifically be required to disclose how existing passenger service will be affected, and how disruptions will be minimized.<sup>10</sup> ODOT believes the regulations should be broadened to require applicants to address passenger operations that have been proposed at the time of the application, and to require applicants to meet with passenger operators as part of the preparation of the service assurance plan. Further, the proposed regulations do not provide any remedies or damages if the service assurance plan is not met.

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<sup>10</sup> Proposed §1180.1(h) should be amended to likewise reference passenger operators as well as short lines.

### Conclusion

For all the foregoing reasons, ODOT requests that the Board amend its proposed regulations to provide the additional specificity discussed herein.

Respectfully submitted,



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Dated: November 17, 2000

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## VERIFICATION

I, Paul A. Adams, Deputy Director of the Oklahoma Department of Transportation, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing Comments.

Executed on November 17, 2000.




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Paul A. Adams

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing Reply of Oklahoma Department of Transportation was served by First Class Mail, Postage Prepaid, on all Parties of Record.

Dated: November 17, 2000

  
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ERIC M. HOCKY